90-793

Supreme Court, U.S.
FILED
OCT 16 1990
JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

MANUEL MUNOZ

Petitioner

v.

DONALD B. RICE

SECRETARY OF THE AIR FORCE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of the Fifth Circuit implement an improper standard of proof which failed to consider the rebuttal of Defendant's explanation after agreeing with the District Court that a prima facie case of discrimination by retaliation had not been established?

A. Did the U.S. Supreme Court decision in United States Postal Service Board of Governors vs. Aikins, 460 U.S. 711, 715 (1983) require the Trial Court to decide the question of whether or not the employer intentionally discriminated against the claimant?

II. Was there an erroneous decision because the Trial Court and the Circuit Court relied on the question of establishing a prima facie case?

A. Did the Trial and Circuit Courts err in evaluating the prima facie case of

reprisal where it was shown that the employer had knowledge of the employee's protected activity and the non-selection took place while the protected activity was continuing?

B. Did the Fifth Circuit Court of Appeals err when it refused to reverse the District Court ruling regarding a prima facie case of reprisal?

PARTIES

The parties to the proceedings are set forth as follows:

Manuel Munoz, Jr., employee of the United States Air Force at Kelly Air Force Base, Texas.

Petitioner

Donald B. Rice, Secretary of Air the Force.

Respondent

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CITATIONS OF THE OPINIONS OF THE LOWER COURT

Manuel Munoz, Jr., and Rose Trevino Montemayor, No. SA-86-CA-1120 (W.D. TX 1990)

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

MANUEL MUNOZ, JR, federal employee
of the Department of the Air Force

Petitioner

v.

DONALD B. RICE
SECRETARY OF THE AIR FORCE

Respondent

On Petition for a Writ of Ceritorari
to the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER
OPINIONS BELOW

Petitioner, Mr. Munoz represents unto this Court the he has been aggrieved by the decision reported below as Manuel Munoz Jr. and Rose Trevino Montemayor, No. 89-5657, (5th Cir. 1990). That the decision sustained a judgment in favor of respondent by the United States District Court for the Western District of Texas, cited as Manuel Munoz, Jr. and Rose

Trevino Montemayor, No. SA-86-CA-1120 (W.D. TX 1990).

STATEMENT OF JURISDICTION

The judgment of the court of Appeals for the Fifth Circuit was entered 27 July, 1990.

There was no request for a hearing and no extension of time within which to file the petition for a writ of certiorari.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The following section of Title VII is involved in this case: 42 U.S.C. § 2000e-3(a), which provides in pertinent part:

> It shall be unlawful employment practice for an employer to discriminate against any of its employees - - because he has opposed any practice made unlawful employment practice by this title [42 U.S.C. §§2000e-2000e-17] or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§2000e - 2000e-17].

STATEMENT OF THE CASE

Mr. Munoz filed suit in federal district court alleging inter alia, that his non selection for promotion was predicated on reprisal discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court found that a prima facie case of retaliation had not been established and the Court of Appeals for the Fifth Circuit affirmed.

The Fifth Circuit judgment contains references to the referral to the selection panel, the non selection and the ongoing protected activities.

Jurisdiction to the United States Court of Appeals for the Fifth Circuit was under 28 U.S.C. §1291 and 28 U.S.C. § 1294.

ARGUMENT

The District Court failed to properly follow prior precedents of courts of appeal and the U.S. Supreme Court in determining whether a prima facie case of reprisal had been established. The Fifth Circuit sustained the erroneous decision and both courts failed to evaluate the case according to the U.S. Supreme Court decisions in the Texas Deparment of Community Affiars v. Burdine, 450 U.S. 248 (1981) and Aikens, supra.

Mr. Munoz had engaged in protected activities, some administrative complaints and a class action Title VII case were in being when he was found qualified, referred, considered, and non-selected. The employers went ahead and selected a Hispanic male. These facts were sufficient to establish a prima facie case.

Evaluation of defendant's explanation was tainted by the belief that Mr. Munoz had not established a prima facie case. The rule 41(b) Motion had been denied and both Burdine, supra and Aikens, supra direct the Court's attention to the defendant's explanation, whether that decision had been motivated by discriminatory animus or whether plaintiff had shown the explanation to be pretextual and without credence.

CONCLUSION

In summary, the United States Court of Appeals for the Fifth Circuit applied an improper standard of proof which failed to consider the rebuttal of Defendant's explanation after agreeing with the District Court that a prima facie case of discrimination by retaliation had not been established. The Supreme Court's decision

in United States Postal Service Board of Governors vs. Aikins, 460 U.S. 711, 715 (1983) requires the Trial Court decide the question of whether or not the employer intentionally discriminated against the claimant. This was not accomplished at either level below. The lower Courts erred in failing to find a prima facie case where it was shown that the employer had knowledge of petitioner's protected activity, i.e., because he was the lead plaintiff in a class action suit as well as a complainant in several successful administrative complaints against the employer.

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition with appendeces was mailed this date, via certified mail, return receipt requested to the following:

Ronald F. Ederer
United States Attorney
Western District of Texas
727 E. Durango Boulevard, Suite A-601
San Antonio, Texas 7806

Solicitor General
Department of Justice
Washington, D.C. 20530

on this 28 day of November, 1990.

SHELBY W. HOLLIN

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-5657

D.C. Docket No. CA-SA-86-1120

MANUEL MUNOZ, JR., AND
ROSE TREVINO MONTEMAYOR,

Plaintiff/Appellants,

versus

DONALD B. RICE, Secretary
of the U.S. Air Foce,

Defendant/Appellee.

Appeal from the United States District
Court for the Western District of Texas

Before
GEE, SMITH, and WIENER,
Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the District Court in this cause be affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to the defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

July 27, 1990

ISSUED AS MANDATE: August 20, 1990.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-5657

D.C. Docket No. CA-SA-86-1120

MANUEL MUNOZ, JR., AND
ROSE TREVINO MONTEMAYOR,

Plaintiff/Appellants,

versus

DONALD B. RICE, Secretary
of the U.S. Air Foce,

Defendant/Appellee.

Appeal From the united States District Court
For the Western District of Texas
(CA-SA-86-1120)

(July 27, 1990)

Before
GEE, SMITH and WEINER
Circuit Judges

PER CURIAM:1

On July 31, 1986, Manuel Munoz,Jr., brough suit against the Secretary of the Department of the Air Force and two employees. Munoz alleged that his non-selection for a promotion at Kelly Air Force was a discriminatory reprisal against him for engaging in a protected activity, in this case lodging of various complaints against his employer relating to alleged civil rights violations. Thus, Munoz contended that the defendants had violated various provisions of the civil Rights Act of 1964 as amended, specifically 42 U.S.C. §§2000e-3(a) and

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1 Local rule 47.5.1 provides: "The publication of opinions that have no precedential value an merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

2000e-16. Munoz also alleged, under 42 U.S.C. § 1985(2), a private conspiracy by the individual defendants to violate his civil rights.

To make his prima facie case of retaliation under section 704(a) of Title VII of the Civil Rights Act,2 Munoz had to establish (1) that he engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Jones v. Flagship Int'l, 793 F.2d 714, 724 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). The district court found that while Munoz adequately proved the first two elements, he failed to establish the third and thus could not

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2 42 U.S.C. §2000e-3(a).

establish a prima facie case. On appeal, Munoz presents several specific challenges to the district court's evaluations of the evidence as to causation. Munoz also contends the district court erred in not sanctioning the defendants for alleged discovery abuses.

We affirm the district court's judgment and its analysis of the factfindings; specifically, we affirm the court's finding that Munoz's prima facie case failed because he did not show a causal connection between the protected activity and the adverse employment decisions. Beyond this, we address only those issues specifically contested on appeal.

At trial it was established (i) General Laughlin telephoned selection panel chairman Juan Garza about Munoz and (ii) Laughlin had never previously

telephoned Garza about a candidate before the selection panel. Munoz argues that the district court erred in not inferring from these facts that either Laughlin, Garza, or both were involved in unlawful retaliation against Munoz because of Munoz's prior complaint. However, there is no evidence in the record to support Munoz's allegations regarding the nature of the telephone conversation and, given that Laughlin had previously transferred Munoz for the specific purpose of removing him from potential retaliation against him, the most reasonable assumption is that, because he was aware of the possibility of retaliation, General Laughlin called to insure that proper procedures were being followed. We find no error in the district court's determination that this was in fact the purpose of the call.

Munoz also asserts that the court erred in denying his trial motion for an adverse inference based upon the alleged deletion of a favorable comment on Munoz's "971" form. This supposed deletion, though it irrelevant to the non-selection, as no evidence suggests that the "971" forms were ever considered by the panel members, and we do not find the district court's factfinding on this issue to be clearly erroneous. Prior to the selection, the panel reviewed only the career briefs. Thus, any alteration of Munoz's 971 form could not have had any effect upon the adverse employment decision at issue.

As to the alleged deletion's use in showing animus toward Munoz, there is no evidence to establish who, if anyone, was responsible for the deletion. Certainly, nothing suggested that the selection panel

members were in any way connnected to, or involved in, the alleged deletion. Moreover, the favorable comment deleted was neither recent nor especially laudatory. Thus, we find no error in the district court's not drawing any adverse inference.

We also find the Air Force's destruction of the career briefs reviewed by the selection panel in no way required the district court to grant Munoz an adverse inference. First, the Air Force regulation cited by Munoz, AFR 40-335 section F (records and review), does not require preservation of actual computer-generated career briefs. Second, we find no error in the district court's finding that during discovery, Munoz was provided with the same information that was available to the panel, as it was generated from the same computer program

and files.

Although Munoz received the updated 1984 version of the briefs during discovery, from this version it was apparent what information was before the selection panel when it reviewed the 1983 career briefs. Though Munoz had filed a Freedom of Information Act request for the documents, this request came two months after the non-selection, and the career briefs had already been destroyed. Then, given that the career brief information was still available from computer records and was provided to Munoz, he has not demonstrated bad faith on the part of the Air Force.

Thus, Munoz's claim fails, as the adverse inference to be drawn from destruction of records is predicated upon bad conduct of the defendants. [T]he circumstances of the act must manifest bad

faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

Next, Munoz contends that the process used by the selection panel was so subjective that is was unconstitutional. Munoz claims that the process, which he calls a "lottery", although facially neutral, actually han an adverse impact upon those, like himself, who had previously registered complaints.

The process employed by the selection panel, though, was not a lottery in any ordinary sence of the word. The relevant decisional criteria were rationally retated to the position being filled and

were known to all of the panel members.[3] Each panel member, based upon his evaluations of the candidates drawn from both the career briefs and personal knowledge, submitted the name of the candidate whom he believed to be the weakest of the eleven candidates. The panel members then continued to submit one name at a time, thus forming three gradually expanding lists. Whenever any candidate's name appeared on all three committee members' lists, that candidate was eliminated.

This process was followed until only four candidates remained. Munoz was eliminated in the second round; the evidence suggested that he was ranked eighth or ninth of the eleven candidates.

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3 Among those criteria important in the position being filled was an ability to get along with others, an area where Munoz fared poorly.

Court's must carefully scrutinize subjective evaluations, which often appear to be arbitrary and are always susceptible to discriminatory application. Ramirez v. Hofheinz, 619 F. 2d 442, 446 (5th Cir. 1980). Here, though, the use of subjective criteria in the selection process does not give rise to a constitutional violation where plaintiff has not shown either an adverse impact on any protected class -- in this case the class of those who previously filed complaints against the Air Force - - or that the subjective criteria were used to disguise discriminatory action. See Id.

Munoz requests sanctions against the defendants under Fed. R. Civ. P. 11 and 37 (b)(2)(c) based upon the defendant's failure to respond timely to discovery requests. Specifically, Munoz asks for a striking of the defendants pleadings or

the drawing of an adverse inference. The defendants argue that Rule 11 applies only to signed documents filed with the Court and does not govern delays in responding to discovery.

We do not pass on this issue here. Rather, we note that we review the district court's decision on whether to impose sanctions only for abuse of discretion under Rule 11, see Cooter & Gell v. Hartmarx Corp., 58 U.S.L.W. 4763, 4769 (U.S. June 11, 1990); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir.1988) (en banc); and under rule 37 (b), see Pressay v. Patterson, 898 F.2d 1018, 1020 (5th Cir. 1990).

As explained above, Munoz has not adduced sufficient evidence to show any bad-faith destruction of documents by the Air Force. The other disocvery abuses alleged by Munoz relate to the Air Force's

failure to tender certain documents even after Munoz had requested and the court had granted, an order to compel. In this case, Munoz's discovery requests were legion, including ponderous seventy-seven interrogatories accompanied by demands for a myriad of documents.

It is within the discretion of the district court to deny Munoz's motion to strike defendants' pleadings, as Munoz presented insufficient evidence to show either objectively unreasonable conduct, as is required for rule 11 sanctions, see Thomas, 836 F.12d at 873, or wilful or bad faith conduct, as is required for dismissal under rule 37 (b)(2)(c),4 see Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 514 (5th Cir. 1985). Because

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4 Striking of the pleadings here presumably would have the same effect as a dismissal. See Marshall v. Segona, 621 F.2d 763, 766 n.4 (5th Cir. 1980).

Munoz did not demonstrate any bad faith destruction of evidence by the Air Force and because the Air Force did produce almost all of the requested documents, we find that the district court was also within its discretion not to draw an adverse inference.

AFFIRMED.5

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5 The notice of appeal was filed on behalf of plaintiffs, Manuel Munoz, Jr. and Rose Trevino Montemayor. We affirm as to both.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MANUEL MUNOZ, JR. AND ROSE TREVINO MONTEMAYOR,	)	
Plaintiffs,	)	
v.	)	SA-86-CA-1120
VERNE ORR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE AIR FORCE; AND JOHN PANTUSO, INDIVIDUALLY, AND ALFRED MEDINA, INDIVIDUALLY, AND HANS LANG, INDIVIDUALLY, AND CLIFFORD BINGHAM, INDIVIDUALLY AND A.T. GONZALEZ, INDIVIDUALLY AND TOMMY RICHARDSON, INDIVIDUALLY, AND LARRY CHEEVERS, INDIVIDUALLY, AND L.M. GRIMARD, INDIVIDUALLY, AND ARNOLD P. SPITZER, INDIVIDUALLY, AND A.D. LOPEZ, INDIVIDIALLY, JUAN SILVA, INDIVIDUALLY AND WILLIAM RAUE, INDIVIDUALLY AND ROBERT WARNEKE, INDIVIDUALLY, AND MILTON ROY BAKER INDIVIDUALLY,	)	
Defendants.	)	

ORDER

The Court has previously dismissed numerous claims in this action. In plaintiff Manuel Munoz's remaining Title VII claim, he alleges that he was not selected for promotion in retaliation for his having filed previous discrimination complaints against defendant Secretary of the Air Force. Plaintiff seeks retroactive promotion to the position.

FINDINGS OF FACT

1 Plaintiff Manuel Munoz has been employed as a civilian employee of the United States Department of the Air Force at Kelly Air Force Base, Texas, at all times herein.

2. Prior to March 1, 1983, plaintiff Munoz had filed numerous complaints of discrimination and retaliation prusuant to Title VII of the Civil Rights Act of 1964.

3. On March 1, 1983, plaintiff Munoz was one of eleven candidates whose names appeared on a Merit Promotion Certificate for consideration to the position of Supervisory Production Controller, GS-1152-12.

4. Air Force policy required the establishment of a panel of three supervisors, each of higher rank than the position to be filled and containing one minority member.

5. The selection panel was composed of Bob Galloway, Gilberto Tobias and Juan Garza. Since the position to be filled existed in Mr. Galloway's section, Mr. Galloway was appointed chairman of the panel.

6. Mr. Galloway inquired of Ms. Patty Byrom, a Personnel Staffing Specialist at Kelly AFB, whether it was necessary for the panel to

interview the candidates.

7. Ms. Byrom advised Mr. Galloway that it was not necessary for the panel to interview the candidates, but that if they chose to interview any of the candidates they must interview them all. The panel followed Air Force regulations in their procedures.

8. All of the panel members were aware that Mr. Munoz had filed previous discrimination complaints against Kelly Air Force Base.

9. General Laughlin contacted Mr. Garza before the panel deliberated to ensure that proper procedures regarding the panel were followed. The General has not previously contacted Mr. Garza when Mr. Garza served on other selection panels. Mr. Garza never related his conversation to the other panel members, because

it did not concern the decision making process.

10. Since the eleven candidates and their job performances were well known to the panel, the panel decided not to interview any of the candidates.

11. The GS-1152-12 Supervisory Production Controller position required four years of general experience and two years of specific experience. All eleven candidates qualified. Once the eleven had made this cut, they were all on equal footing before the selection committee.

12. The selection committee did not follow written, specific guidelines in filling the GS-12 position. The selection panel wished to fill the position with the best qualified individuals based on past job performance, future potential, and a

demonstrated ability to get the job done. They sought broad work experience, aricraft expericence, communication skills, and an ability to work well with people.

13. The Civilian Personnel Supervisory Production Controller Posiiton Description dated January 3, 1983, emphasized that the controller:

> "must have a thorough knowledge of production control operating procedures and industrial methods as applied to repair/overhaul procedures in order to develop practical operating procedures for assuring material availability, scheduling, and sequencing of work. He must have a thorough knowledge and understanding of AF, AFLC, and local directives, procedures, shop functions and layout, and a good knowledge of aircraft. He must be able to plan, supervise, and coordinate work performed by employees and give direction in a positive, effective manner as decisions, committments, procedures, and policies established have a direct effect on the efficiency, productivity and overall

effectiveness of the maintenance production effort. Tact and good judgment are necessary in relations with others as considerable coordingation is also required in accomplishment of special tasks."

14. The selection panel reviewed the Computerized Placement Data Brief of each of the eleven candidates before entering into their deliberations. The actual briefs were disposed of after the selection process was completed.

15. The selection panel each reviewed the placement data briefs, talked about each of the candidates, and then reached independent conclusions as to which of the candidates they supported. They did not assign specific weight to factors in the brief.

16. The panel did not discuss plaintiff Munoz's EEOC history. The panel did

discuss Munoz's difficulty in getting along with others.

17. Plaintiff's previous EEOC complaints and cases against the Air Force were not factors in the decision to pass over Mr. Munoz for promotion.

18. The panel selected these top four candidates in this fashion. Each panel member would write their three weakest candidates on a piece of paper in an elimination round. When three names matched, the candidate was not selected for promotion.

19. Mr. Munoz was not selected in the second of these elimination rounds, meaning that the panel ranked him eighth or ninth of the eleven candidates.

20. When four candidates remained, the panel selected Mr. Carrasco.

21. Mr. Jose Carrasco was selected on the basis of excellent job performance, specific knowledge of the section in which the Supervisory Production Controller was to work, a demonstrated ability to get the job done, and a good rapport with co-workers, subordinates, and supervisors. Each panel member felt that Mr. Carrasco was the best qualified man for the job.

22. Mr. Jose Carrasco received an Outstanding performance in 1980 and a Sustained Superior Performance rating in 1966. Mr. Munoz has also received other lesser awards not included in the career brief.

23. Mr. Carrasco had demonstrated a high level of job performance during a special project which involved a similar level of coordination as that

needed in the job to be filled.

24. Mr. Carrasco was better qualified for the Supervisory production Controller Position than was plaintiff Munoz.

25. Plaintiff has properly exhausted all adminstrative remedies before bringing this lawsuit.

CONCLUSIONS OF LAW

The Court has jurisdiction over plaintiff's allegations pursuant to Title VII of the Civil Rights Actof 1964, 42 U.S.C. §2000e et seq. §704(a) of Title VII provides that:

> "it shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. §2000e-3(a).

An employee who sues under §704(a) must prove a prima facie cause of

discrimination. Once the employee has met his prima facie burden, the burden of production shifts to the employer, who must articulate a legitimate, non-discriminatory justification for his action. McDonnel Douglas Corp. v. Green, 411 U.S. 702, 802, 93S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) cited in Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1571 (5th Cir. 1989).

Ultimately, the employee must prove a causal connection between the protected activity and the adverse employment decision. The connection required is causation in fact. The employee will prevail only by proving that "but for" the protected activity, he would not have been subjected to the adverse action. Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984) cited in Johnston, supra, 869 F2d at 1571.

A plaintiff establishes a prima facie case of retaliation by showing (1) that he was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Jones v. Flagship International, 793 F.2d 714, 724 (5th Cir. 1986) cert denied 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001. If no legitimate, nondiscriminatory reasons for the defendant's actions exists or if the plaintiff can show any reason proffered by defendant to be a pretextual reason for discrimination, then Title VII liability results.

The Court finds that plaintiff did not engage in a protected activity under 704(a). Plaintiff had filed numerous discrimination complaints against

defendant Air Force and was the named plaintiff in a class action lawsuit against the Air Force at the time of his nonselection for promotion. Such nonselection for promotion constitutes an adverse employment action. However, plaintiff does not sufficiently show a causal connection between the two.

Plaintiff proved that each selection panel member knew plaintiff had previously filed many discrimination charges against the Air Force. Plaintiff did not show that any panel members discussed plaintiff's previously filed charges or considered them during deliberation. Plaintiff did not sufficiently prove that "but for" his previous discrimination charges, he would have been promoted.

In fact, defendant Air Force conclusively established a legitimate, non-discriminatory justification for

plaintiff's nonselection. The job required tact, coordination between branches, and one who had positive employee relations; the plaintiff had difficulty working with people. The panel members wanted an employee who had demonstrated an ability to get the job done; plaintiff did not have this reputation. The panel members chose Mr. Jose Carrasco because of his qualifications in these areas. Additionally, the placement data briefs reflected that Mr. Carrasco had received and Outstanding Performance Rating in 1980 and a Sustained Superior Perforance Rating in 1978. Plaintiff Munoz had received only an Outstanding Perforance Rating in 1966.

Plaintiff requests that the Court grant plaintiffs an "adverse inference," because the panel disposed of the computerized placement data briefs after examining them. Plaintiff contends that

they should have been saved pursuant to Air Force Regulation 40-335. As a result, plaintiff has not received the actual data placement brief during discovery, but has received a later version of the brief, dated 1984. In light of the facts that the information was stored on a computer file, the updated version accurately reflects plaintiff's record in 1983, and plaintiff's testimony did not raise questions about the 1984 edition's accuracy, plaintiff's "adverse inference" request will be denied.

The evidence shows that the panel selected the better qualified Mr. Jose Carrasco for legitimate, non-discriminatory reasons. The panel made it clear that plaintiff was not the second choice for the job; in fact, plaintiff ranked eighth or ninth in the field of eleven candidates. Plaintiff has not met

his burden of proving a pretextual reason for discrimination. The Court finds no evidence of retaliation under Title VII. Plaintiff's claim of retaliatory non-selection for promotion is hereby DENIED. Each party is to bear their own costs.

SIGNED this 31st day of October, 1989.

H.F. GARCIA
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-793

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL MUNOZ, JR., PETITIONER

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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6

QUESTION PRESENTED

Whether the court of appeals and the district court properly determined that the Air Force had not intentionally retaliated against petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-793

MANUEL MUNOZ, JR., PETITIONER

v.

DONALD B. RICE, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-34) and the opinion of the district court (Pet. App. 36-51) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1990. The petition for a writ of certiorari was filed on October 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a civilian employee of the United States Air Force at Kelly Air Force Base, Texas. In March 1983,

he became eligible for a promotion. Upon consideration of eleven qualified candidates, the selection panel chose one of the others. Pet. App. 37-38. On July 31, 1986, after exhaustion of his administrative remedies, petitioner filed a complaint in district court alleging, *inter alia,* that the panel had not selected him in retaliation for numerous prior complaints of discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. App. 22.

After dismissing all but petitioner's Title VII claim, the district court held a bench trial on the merits of that claim. At its conclusion, the court found that while the selection panel members knew of petitioner's history of discrimination complaints, they did not consider or discuss that history, and that petitioner's prior "complaints and cases against the Air Force were not factors in the decision to pass [him] over * * *." Pet. App. 43. The court found further that the candidate who was ultimately selected was better qualified than petitioner, *id.* at 45, and that the Air Force "conclusively established a legitimate, nondiscriminatory justification for [petitioner's] nonselection." *Id.* at 48-49. The district court determined that petitioner had failed even to state a prima facie case, and it ultimately concluded that there was "no evidence of retaliation * * *." *Id.* at 51.

2. The court of appeals affirmed. Pet. App. 21-34. It agreed with the district court that petitioner had failed to state a prima facie case of retaliation by failing to establish a causal connection between petitioner's protected activity and the adverse employment decision. The court of appeals generally affirmed "the district court's judgment and its analysis of the factfindings * * *." *Id.* at 24.

ARGUMENT

Petitioner presented no evidence of retaliation and failed to prove a link between his protected activity and his non-selection. The court of appeals' decision affirming the district court is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

Petitioner argues that the district court and the court of appeals erred by addressing whether he stated a prima facie case of retaliation, rather than whether the Air Force in fact retaliated against him. Pet. 15-16. He relies on *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), in which this Court held that after a trial on the merits of a Title VII action, the court must focus on the ultimate factual issue of discrimination, not on the question of a prima facie case.

Petitioner's contention is incorrect. Although the district court did conclude that petitioner had not shown a prima facie case, it also held that he failed to carry his ultimate burden of proof. The district court determined that petitioner's previous complaints "were not factors" in his non-selection, Pet. App. 43, that the candidate who was chosen was better qualified, *id.* at 45, that the Air Force "conclusively established a legitimate, nondiscriminatory justification" for its selection, and that there was "no evidence of retaliation * * *." *Id.* at 48, 51. The court of appeals affirmed these factual and legal conclusions. Plainly, the district court decided "which party's explanation of the employer's motivation it believes," *Aikens*, 460 U.S. at 716, and properly addressed the question of discrimination. See *id.* at 714, 716.*

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* Thus, petitioner's argument that the district court erred in failing to find a prima facie case of retaliation is irrelevant. Once the trial is complete, that question "drops from the case." *Aikens*, 460 U.S. at

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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715, quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255, n.10 (1981). The court found that petitioner had failed to meet his burden on the "ultimate factual issue in the case." *Aikens*, 460 U.S. at 715.

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